

In the Court of Appeals of the State of Alaska

Charles Bunaqbethaq Henry,)	
)	Court of Appeals No. A-12657
Appellant,)	
v.)	Order
)	
State of Alaska,)	
)	
Appellee.)	Date of Order: September 11, 2018
)	

Trial Court Case # **4FA-14-03397CR**

Attorney Michael L. Barber, who represents the Appellant, Charles B. Henry, has filed a motion for a representation hearing for his client. Mr. Barber explains in his affidavit supporting his motion that — based on his communications with Mr. Henry, and on Mr. Henry’s pro se filings in this appeal — Mr. Henry apparently believes that Mr. Barber has been ineffective in the preparation of Mr. Henry’s opening brief. Because of this, Mr. Henry wants a different attorney appointed to represent him. The Appellant’s opening brief has already been filed and accepted in this appeal.

Because Mr. Henry is represented at public expense (by contract through the Office of Public Advocacy), he does not have the right to reject appointed counsel and have new counsel appointed at public expense in the absence of any showing of cause for that change. *See Mute v. State*, 123 P.3d 1081, 1088 (Alaska App. 2005). If Mr. Henry wants new counsel appointed at public expense, then the superior court must determine whether there is good cause for that change.

In the alternative, Mr. Henry may instead choose to represent himself in this appeal. But because he also has a constitutional right to counsel to assist him in the appeal, unless and until he knowingly and intelligently waives that right, any legal proceedings in which he is not represented by counsel would be void. *See Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938) (holding that a deprivation of the right to counsel is equivalent to a lack of jurisdiction).

If Mr. Henry desires to represent himself, then the superior court must determine whether Mr. Henry is willing to enter a knowing and intelligent waiver of the right to counsel, and if so, whether he is capable of representing himself on appeal.

Accordingly, IT IS ORDERED:

1. Mr. Henry's case is remanded to the superior court to determine whether there is good cause to allow Mr. Barber to withdraw from representing Mr. Henry, and, if so, to appoint new counsel to represent Mr. Henry at public expense. If the superior court finds that there is no good cause to appoint new counsel at public expense, then Mr. Barber shall continue to represent Mr. Henry, and the superior court shall inform this Court of these circumstances.

2. If Mr. Henry instead wishes to represent himself — rather than be represented by Mr. Barber — then the superior court shall conduct an inquiry to make sure that Mr. Henry understands the benefits of counsel and the dangers of representing himself, and to make sure that Mr. Henry is minimally competent to represent himself — i.e., that he is capable of presenting a comprehensible argument on appeal.

3. As a suggestion, the superior court might advise Mr. Henry of the following aspects of litigating an appeal:

A criminal defendant who wishes to represent himself on appeal should bear in mind that an appellate court can not re-weigh the evidence or re-determine the facts of his case. Rather, an appellate court can only decide whether errors of law or mistakes of procedure were committed during the trial court proceedings. Because of this, it is important for a person who is pursuing an appeal to have a working knowledge of criminal law and criminal procedure, as well as good legal research skills, so that they can find the statutes and court decisions that apply to their case. Attorneys have specialized training and experience in these matters, so it is usually better to have an attorney's assistance when pursuing an appeal.

In addition, it helps to have good writing skills — because, in an appeal, a person's arguments are presented to the court primarily in written briefs.

Moreover, the rules governing an appeal are often technical. (For example, there is Appellate Rule 210(b)(1) — the rule that says that if a person wants the appellate court to have a transcript of what happened in the trial court, the person must designate the portions of the trial court proceedings to be transcribed.) Again, attorneys are generally familiar with these rules, or can discover them without much trouble, so it is usually better to have an attorney's assistance.

4. If, after Mr. Henry is advised of the benefits of counsel and the dangers of self-representation, he still wishes to represent himself, and if the superior court concludes that Mr. Henry is at least minimally competent to do so, the superior court shall inform this Court of these circumstances. Mr. Henry will be allowed to represent himself in this appeal.

5. If, on the other hand, Mr. Henry decides not to represent himself, or if the superior court concludes that Mr. Henry is not minimally competent to pursue this appeal on his own, then Mr. Barber shall continue to represent Mr. Henry. The superior court shall inform this Court of these circumstances.

6. Because Mr. Henry has a constitutional right to the assistance of counsel on appeal, he must expressly and knowingly waive this right if he wishes to dismiss his court-appointed counsel and represent himself. Accordingly, if Mr. Henry is unable to make up his mind about whether to represent himself, this means that he has not waived his right to counsel, and Mr. Barber shall continue to represent him in this appeal.

7. Mr. Henry may also desire, if he has the means, to hire a private attorney to represent him. If this is the case, then the superior court will give Mr. Henry 60 days to retain private counsel, and the superior court shall inform this Court of this circumstance.

8. The superior court's report on these matters shall be transmitted to this Court on or before September 27, 2018.

Entered under the authority of Chief Judge Mannheimer.

Clerk of the Appellate Courts

M. Johnson, Deputy Clerk

cc: Judge Lyle
Trial Court Clerk - Fairbanks
Distribution:

Michael L. Barber
Barber Legal Services
PO Box 240905
Anchorage AK 99524

Nancy R Simel
Office of Criminal Appeals
1031 W. 4th Ave, Suite 200
Anchorage AK 99501